SERVED: May 12, 1992

NTSB Order No. EA-3546

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 16th day Of April, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v. Docket SE-8906

JOSEPH J. HODGES, JR.,

Respondent.

OPINION AND ORDER

Respondent has appealed from the initial decision that Administrative Law Judge Joyce Capps issued from the bench at the conclusion of an evidentiary hearing held April 11, 1989.[1] The law judge affirmed an order of the Administrator charging respondent with an unauthorized entry into the New York Group I Terminal Control Area (TCA), a violation of sections 91.90(a)(l)(i) and 91.9 of the Federal

[1] A copy of the oral initial decision, an excerpt from the transcript, is attached. The court reporter numbered the pages from 1 to 9.

Aviation Regulations (FAR).[2] The law judge, however, reduced the sanction from a 60-day to a 45-day suspension of respondent's commercial pilot certificate.

Respondent makes two claims of error in the law judge's decision. First, he argues that two pieces of evidence -- computerized radar tracking data and the report of a sighting of the aircraft by an unidentified pilot -- should have been excluded as hearsay. The thrust of respondent's argument is that, absent this evidence, there is insufficient support in the record for the law judge's finding that it was respondent's aircraft that violated the TCA. Second, respondent claims that precedent requires the case to be

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[2]FAR sections 91.90(a)(l)(i) and 91.9 (currently 91.13(a)) read:

"§ 91.90 Terminal control areas.

(a) Group I terminal control areas--

(1) Operating rules. No person may operate an aircraft within a Group I terminal control area designated in Part 71 of this chapter except in compliance with the following rules:

(i) No person may operate an aircraft within a Group I terminal control area unless he has received an appropriate authorization from ATC prior to the operation of that aircraft in that area.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

dismissed for failure positively to identify respondent's aircraft.[3]

The Board finds no merit to these contentions and, therefore, respondent's appeal will be denied.[4] There is more than adequate evidence to support the law judge's finding that it was indeed the plane respondent was flying (Piper Seneca N5264T) that was in the TCA without authorization. Although the evidence is circumstantial, it is reliable. We agree with the law judge that "[t]here are just too many coincidences here . . . not to draw the inferences that I must draw." Initial decision at 5.

The evidence offered by the Administrator consists of testimony of a number of individuals that, when viewed together, leaves little doubt that respondent operated within the New York TCA on April 30, 1987, without prior authorization. The chain of events begins with the observation and tracking by an air traffic controller (ATC), Mr. Pellicani, of an unidentified plane in the TCA without authorization. The aircraft was first seen by Mr. Pellicani on his radar scope a little before 11:52 A.M., 11 miles southeast of JFK Airport at 4,500 feet (within the TCA[5]), squawking the VFR (visual flight rules) code 1200. Tr. p.

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[3]Respondent cites Cassera, Airman Certificate, 5 CAB 450 (1943) and Raymond Jolly, 34 CAB 897 (1961).

[4]The Administrator has withdrawn his appeal of the law judge's sanction reduction.

[5]At the particular location where the aircraft was spotted, the TCA extends from 1,500 to 7,000 feet.

119. The plane was seen northeast bound and descending. At 4,000 feet, Mr. Pellicani "tagged" the aircraft "TCA-l" for identification and continued tracking purposes.[6] He testified that he tracked it to its "short final [approach]" to Republic Airport. Tr. p. 161.

During this time, Mr. Pellicani was also working a commuter aircraft proceeding southwest out of nearby Islip Airport. He advised the commuter pilot of the presence nearby of the unidentified TCA-1 and asked him whether he could see it. hr. Pellicani testified that the commuter pilot reported spotting an aircraft when they were at the same altitude (2700 feet) and 1 1/2 miles apart laterally, and identified it as a Piper Seneca. According to Mr. Pellicani, based on his radar scope and the fact that there were no other aircraft in the area, he concluded that the Piper Seneca was TCA-1, his unidentified intruder.

Seeing that the aircraft was headed in the direction of Republic Airport, Mr. Pellicani then contacted that airport and was informed that Republic tower was handling a Piper Seneca preparing to land on Republic's runway 32.

Computerized ARTS (Automated Radar Terminal System) radar tracking data and plots of that data (Exhs. A-5 and 10) were also introduced. ARTS computer data is used in air traffic control. With the plots, TCA-1's route from the time

[6]In his deposition, Mr. Pellicani testified that he saw the aircraft at 4,000 (rather than 4,500) feet. At the hearing, he explained that he "tagged" it at 4,000 feet, after first seeing it at 4,500 feet. Tr. p. 133-134.

it was tagged was graphically illustrated. These exhibits were explained by Stanley Anderson, an FAA air traffic control automation specialist.

The data reveal that, at 11:52 A.M. on the date in question, TCA-1 was located at 3,700 feet, 12 miles into the 20-mile boundary of the TCA. Tr. p. 185. At 12:02 P.M., the tagged aircraft was at 700 feet in the immediate vicinity of Republic Airport. The airport's landing log (see Exh. A-1) confirms that, at 12:03 P.M., a Piper Seneca N5264T, respondent's plane, landed on runway 32.[7]

We find no merit in either of respondent's challenges to the law judge's decision. We note initially that hearsay evidence is admissible in administrative proceedings. See. e.g., Administrator v. Howell, 1 NTSB 943, 944 at n. 10 (1970) ("[Hearsay evidence is admissible in administrative proceedings, with its hearsay quality bearing only on the weight to be accorded such evidence.") We find no basis to reject evidence of communications between the ATC and the pilot of the commuter aircraft, routinely recorded by the controller contemporaneous to the event. The fact that the ATC did not make an effort to identify the commuter pilot does not warrant rejecting the aircraft-type information the

[7]Exhibit A-1 was sponsored into evidence by Walter F. Walker, assistant chief safety officer at Republic, who testified that the documents (a certified copy of the airport's aircraft landing records for April 30, 1987, both handwritten and computer generated, certified by Michael McDade, the airport's chief safety officer) are records used by and prepared at the airport in the normal course of business for the collection of landing fees.

latter provided. It is simply one piece of information to be weighed in making findings of fact. And we note that, even were that identification excluded from the record, there is sufficient other evidence remaining to support the law judge's finding against respondent.

We find further that respondent's challenge to the computer data is without merit. We reject the suggestion that, whenever such data is used, the Administrator must affirmatively prove its accuracy. Instead, as the Administrator notes, the accuracy of the ARTS data may be assumed, in this case at least. The ARTS system is critical to the operations of New York's Group I TCA, and the equipment is tested to ensure it is operating within acceptable norms. Tr. p. 207-8.[8] Respondent suggests no reason to believe it was not working properly on April 30, 1987, and we see no basis to conclude it was not.

The circumstances in the instant case are in sharp contrast to the two cases respondent cites, Cassera and Jolly, sums. Absent reliable, probative evidence of pilot identity, the Board was compelled to dismiss the charges in those cases.[9] The case before us here does not require

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[8]Mr. Anderson testified that the 300-foot deviation between the computer's 11:52 recorded altitude for TCA-1 of 3,700 feet and Mr. Pellicani's report of 4,000 feet is within acceptable deviation. Given that the aircraft was descending fairly rapidly, this 300-foot difference could also be accounted for by unsynchronized clocks.

[9]In Jolly, two aircraft were involved, only the pilot of one was cited, and the *eyewitness* could not differentiate between the two. In Cassera, there was only hearsay evidence connecting respondent to the offending aircraft.

that we rely on the eyewitness account of the unidentified commuter pilot, but rather on a series of witnesses and records that establish that there was a plane that entered the TCA on a date and time and at a place identified, and that later landed at Republic Airport piloted by respondent. Contrary to respondent's suggestion that the law judge's decision is inconsistent with precedent and Board policy regarding the adequacy of identification, the evidence in this case, and use of circumstantial evidence in TCA incursion cases, is not atypical. See, ea., Administrator v. Blackman, NTSB EA-3494 (1992) (based on chain of circumstantial evidence, respondent found to violate the TCA). Especially relevant here is our statement (slip op. at 5): "Although mistaken identification can occur, we believe the evidence overcomes any reasonable possibility of it here."

In sum, the Board finds that the evidence amply supports the law judge's finding that the plane respondent landed at Republic Airport at 12:03 P.M. was the same plane as the one tagged TCA-1, followed on radar by Mr. Pellicani and tracked by the ARTS computer. We also find that the computer tracking and commuter pilot identification evidence presented here is not unreliable or unsubstantiated hearsay. Instead, its reliability is confirmed by the other evidence in the record.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's order, as modified by the law judge, and the initial decision are affirmed; and

3. The 45-day suspension of respondent's commercial pilot certificate shall begin 30 days after service of this order.[10]

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[10]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR section 61.19(f).